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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 635/2014

Decision adopted by the Committee at its fifty-sixth session (9 November-9 December 2015)

Submitted by:	M.K. and B.B. (represented by counsel, Amandine Torrent)
Alleged victim:	The complainants
State party:	Switzerland
Date of complaint:	15 September 2014 (initial submission)
Date of decision:	26 November 2015
Subject matter:	Deportation to Spain
Procedural issues:	Non-exhaustion of domestic remedies; failure to substantiate the complaint
Substantive issues:	Risk of torture upon return to the Democratic Republic of the Congo
Articles of the Convention:	3 and 22

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-sixth session)

concerning

Communication No. 635/2014*

Submitted by:	M.K. and B.B. (represented by counsel, Amandine Torrent)
Alleged victim:	The complainants
State party:	Switzerland
Date of complaint:	15 September 2014 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 26 November 2015,

Having concluded its consideration of communication No. 635/2014, submitted on behalf of M.K. and B.B. under article 22 of the Convention,

Having taken into account all information made available to it by the complainants, their counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention

1.1 The complainants are M.K. and B.B., Congolese nationals born in 1975 and 1968, respectively. They claim that their deportation to Spain, from where they would subsequently be extradited to the Democratic Republic of the Congo, would constitute a breach by Switzerland of article 3 of the Convention. The complainants are represented by counsel, Ms. Amandine Torrent.

1.2 On 3 November 2014, in application of rule 114, paragraph 1, of its rules of procedure, the Committee asked the State party not to deport the complainants to Spain while their complaint was being considered. On 4 November 2014, the State party informed the Committee that the complainants' removal would not go ahead. On 9 January 2015, in the light of the State party's observations and the complainants' comments thereon, the Committee decided to withdraw its request for interim measures under rule 114, paragraph 1, of its rules of procedure. On 27 August 2015, the Committee also decided to consider the admissibility of the communication separately from the merits.

* The following members of the Committee participated in the consideration of the present communication: Ms. Essadia Belmir, Mr. Alessio Bruni, Mr. Satyabhoosun Gupt Domah, Mr. Abdoulaye Gaye, Mr. Jens Modvig, Ms. Sapana Pradhan-Malla, Mr. George Tugushi and Mr. Kening Zhang.

The facts as submitted by the complainants

2.1 The complainants are both members of the Congolese National Police. Before fleeing the Democratic Republic of the Congo, B.B. was a captain and commander-in-chief of Kalamu police station in the municipality of Kinshasa, while M.K. was a police officer. The complainants have seven children, who remained in the Democratic Republic of the Congo.

2.2 As part of Operation Likofi (Punch), which was ordered by President Kabila and launched in Kinshasa by the Congolese National Police and the secret service in a bid to combat organized criminal gangs, B.B. was instructed to compile a list of "*kuluna*" (delinquents) who were to be hunted down and executed. On 2 December 2013, B.B. refused to draw up the list. The following day, two citizens were executed in his police district. There was a public backlash against the murders and people entered the office of B.B., who openly condemned the police division responsible for the execution.

2.3 Two days after B.B. had made those comments, armed, hooded men arrived at his office in two jeeps that M.K. identified as being registered to the police rapid response unit. The men beat B.B., causing him to lose consciousness and breaking his arm.[1] They threatened to come back and kill him by order of the Congolese authorities. B.B. was taken to hospital. The complainants then lived in hiding until their departure from the country.

2.4 The complainants sold their plot of land to enlist the help of a smuggler. They left the Democratic Republic of the Congo by using fake passports and assumed names. On 3 April 2014, they arrived in Spain, where they obtained Schengen visas valid until 3 May 2014. The complainants did not file an asylum application in Spain. They claim that, on arrival in Spain, they saw a Congolese colleague with the rank of major who was working in the country and spotted them immediately. The complainants state that they must have been followed to their accommodation because, 24 hours after arriving, they were visited by Congolese security officers, who threatened them with an imminent return to the Democratic Republic of the Congo. They consequently fled the country and, on 14 April 2014, reached Switzerland, where they submitted an asylum application to the Federal Office for Migration on 22 April.

2.5 By a non-consideration decision issued on 16 July 2014, the Office dismissed the complainants' asylum application. It held that, pursuant to Regulation No. 614/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III), Spain was responsible for conducting asylum proceedings and that the complainants should therefore be handed over to the Spanish authorities. On 15 July 2014, the Swiss authorities obtained consent from the Spanish authorities to hand over the complainants. The Office found that there were no grounds to examine the issue of the prohibition of refoulement to the State of origin or departure, as the complainants were being sent back to a third State, Spain, that respects the principle of non-refoulement.

2.6 The complainants lodged an appeal with the Federal Administrative Court on 26 July 2014, claiming that the lower court had failed to consider the facts properly and that there had been no assessment of the risk of torture, reprisals and persecution faced by the complainants at the hands of the Congolese authorities if returned to Spain, from where they would be in danger of being extradited to the Democratic Republic of the Congo. On 31 July 2014, the Court rejected the complainants' request for legal assistance and, having

[1] The complainants have appended to their communication a copy of a document from the radiology department in Yverdon-les-Bains, which gave a presumptive diagnosis of fractures of the wrist and a bone in the hand.

concluded that their appeal seemed destined to fail from the outset, set them a deadline for the advance payment of fees. On 20 August 2014, the Court declared the appeal inadmissible as the advance payment of fees had not been made by the deadline set.[2] The Court therefore upheld the Office's non-consideration decision and order for removal.

2.7 On 22 August 2014, the complainants submitted an application for review of the Court's judgement, citing as new evidence a wanted notice dated 18 April 2014 that the Congolese National Intelligence Agency had allegedly sent to the Spanish authorities. In the notice, the Agency accused the complainants of disobeying orders and of desertion and treason, and requested the Spanish authorities to extradite them. On 28 August 2014, the Court declared the application for review inadmissible on procedural grounds, indicating that it was in fact an application for review of the original decision in the light of new evidence, and that only the Federal Office for Migration was competent to examine that evidence with a view to assessing the risk faced by the complainants if deported to Spain.[3] Thus, on 22 September 2014, the complainants filed an application for review of the Office's decision of 16 July 2014 along with a request for suspensive effect.[4] On 6 October 2014, the Office dismissed the application on the grounds that the notice in question was not liable to alter the non-consideration decision as it was a copy, of dubious authenticity and, in any case, did not appear to demonstrate that, if the complainants were transferred to Spain, that State would violate the principle of non-refoulement or fail to examine their asylum application properly.

2.8 On 6 November 2014, the complainants appealed the Office's decision of 6 October 2014. By interlocutory decision of 12 November 2014, the Federal Administrative Court declared the complainants' application for refugee status inadmissible. It also dismissed the complainants' request to suspend their transfer given that the transfer had already been suspended by virtue of the complaint lodged with the Committee.

The complaint

3. The complainants maintain that they will be at risk of torture or even death if returned to the Democratic Republic of the Congo because of their refusal to collaborate and B.B.'s public condemnation of the role played by the Congolese police in the extrajudicial killings. They submit that, if transferred to Spain, they will be sent back to the Democratic Republic of the Congo pursuant to the wanted notice issued for them by the Congolese authorities accusing them of treason for having deserted the country. They state that, although they would be at risk of death or torture in the Democratic Republic of the Congo, the close cooperation between the Spanish and Congolese authorities would inevitably lead to their return, particularly as they had been visited by Congolese officers during their stay in Spain.

State party's observations on admissibility

4. On 27 November 2014, the State party submitted its observations on the admissibility of the communication. It requested that the communication should be declared

[2] The fees amounted to 600 Swiss francs.

[3] In its decision, the Federal Administrative Court indicates that a review may concern only formal matters and not material evidence such as that submitted by the complainants.

[4] In its decision dated 24 October 2014, in which it grants emergency assistance to the complainants until the date of their departure (4 November), the Population Service of the Canton of Vaud mentions that the new application filed by the complainants is an extraordinary procedure that does not suspend the enforcement of removal, and that the application has been deemed to be multiple within the meaning of article 111c of the Federal Asylum Act, paragraph 2 of which states that: "Multiple applications that are groundless or state the same grounds shall be dismissed without a formal decision being taken."

inadmissible and that the interim measures should be lifted as the complainants had failed to exhaust domestic remedies. The complainants submitted their case to the Committee on 15 September 2014 and, on 22 September 2014, filed an application for review of their case with the Federal Office for Migration, which rejected the application by its decision of 6 October 2014. The complainants subsequently appealed the decision before the Federal Administrative Court. That appeal was also rejected by an interlocutory decision of 6 November 2014. On 12 October 2014, the Court set the complainants a deadline of 28 November 2014 for the advance payment of fees, failing which their appeal would be declared inadmissible. Since the proceedings before the Court were pending, the State party considered that the complainants had not exhausted all available domestic remedies.

Complainants' comments on admissibility

5.1 On 5 January 2015, the complainants submitted their comments on the State party's observations, arguing that, when they submitted their case to the Committee on 15 September 2014, they had exhausted all domestic remedies. On that date, they were subject to an enforceable order for removal to Spain.

5.2 The complainants asserted that, once their request for legal assistance had been rejected by the Federal Administrative Court on the grounds that their appeal seemed destined to fail, they were deprived of any possibility of exercising their procedural rights. As they had no financial resources, they were unable to make the advance payment of fees as required. They added that, in any event, the fact that applications for review are always possible means that domestic remedies can never be exhausted.

5.3 The complainants stated that, in view of the wanted notice issued for them, they feared that Spain would return them to the Democratic Republic of the Congo without conducting a legal procedure and, therefore, without a careful consideration of the merits of their asylum application and without granting them access to an effective remedy. They contend that such was the case for some Sudanese immigrants, who were apparently repatriated from Spain without a legal procedure. Moreover, according to the complainants, the conditions in which asylum seekers are held in Spain are poor.

6. On 2 February 2015, the complainants insisted that, if returned to Spain, they would be sent back to the Democratic Republic of the Congo. They reproached the Swiss authorities for having completely dismissed the new piece of evidence submitted in support of their application for review, namely the wanted notice. They added that, since M.K. was pregnant, with a due date of 15 August 2015, the Spanish authorities should be called upon to guarantee appropriate conditions of reception. B.B., meanwhile, was set to undergo surgery on his hand in March 2015 and the enforcement of the removal order would interrupt his treatment.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a complaint, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

7.2 The Committee notes that the State party contested the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies, as an appeal was being examined by the Federal Administrative Court when the complaint was submitted to the Committee. The complainants claimed that the Court had concluded that their appeal was

"destined to fail" and had therefore rejected their application for legal assistance and requested an advance payment of fees. Given that the appeal had little chance of success, the exceptional and non-suspensive nature of applications for review and the previous decisions of the Federal Office for Migration and the Federal Administrative Court, the Committee considers that the complainants exhausted all available domestic remedies.

7.3 The Committee notes the complainants' argument that they would be at risk of torture or even death if returned to the Democratic Republic of the Congo because of B.B.'s public condemnation of the Congolese police. They claim that the close cooperation between Spain and the Democratic Republic of the Congo would lead to their return pursuant to the wanted notice issued by the Congolese authorities and that they would not have access to an effective remedy to prevent their return. The Committee considers, however, that these allegations are based on assumptions and that the complainants have failed to provide specific evidence to substantiate their contention that the Spanish authorities would not examine the merits of their asylum application with due consideration for the principle of non-refoulement. The Committee considers, moreover, that the complainants have not supplied concrete information to justify their claim that the conditions in which asylum seekers are held in Spain are such that they would be vulnerable to the violation of their rights under the Convention. The Committee therefore concludes that the complaint as submitted by the complainants is manifestly unfounded and thus inadmissible under article 22 of the Convention and rule 113 (b) of its rules of procedure.

8. The Committee consequently decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the complainants and to the State party.